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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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No. 43300 -1- II

Thurston County Superior Court # 11-2-01733-5
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

SSHI LLC, a Delaware limited liability corporation dba DR
Horton

Petitioner/Appellant

vs.

THE CITY OF OLYMPIA,
a Washington municipal corporation

Respondent

OLYMPIA SAFE STREETS CAMPAIGN, INC., a Washington
non-profit corporation

Intervenor

INTERVENOR'S RESPONSE BRIEF

Atty: Robert B. Shirley, WSBA 25252
1063 Capitol Way S. # 202
Olympia, WA 98501
360-556-7205
robertshirleyattorney@hotmail.com

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STATUTES

RCW 4.84.370	40
RCW 36.70B.030(1)	26 and n.10

OLYMPIA MUNICIPAL CODE

OMC 12.02.020	24 n.8
OMC 18.02.040	27 n.10
OMC 18.02.100	27 n.10
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T3.13(h)	4, 24
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1

2

5

7

1 On the topic of bicycle and pedestrian connectivity, the City
2 found that “the present record is inadequate to make a determination that
3 the Trillium MPA meets the requirements for bicycle and pedestrian
4 connections set forth in the City Code, including the Engineering Design
5 and Development Standards (“EDDS”) and the Comprehensive Plan.
6 However, in light of the council’s decision, a remand is unnecessary.” In
7 addition, the City concluded “that the proposal is not consistent with the
8 policies of the Comprehensive Plan or the purposes of the NV zone
9 relating to bicycle and pedestrian connectivity.”

10 Horton’s only contention on appeal is that substantial evidence
11 does not support the City’s findings and conclusions. Horton argues that
12 its own evidence that its MPA meets the City’s standards is more
13 persuasive evidence than the evidence relied on by the City. To prevail in
14 a substantial evidence challenge Horton must demonstrate there is not
15 substantial evidence on which the City could have relied to reach its
16 conclusion. A demonstration that some contrary evidence exists to
17 support a different conclusion is not sufficient to sustain a challenge that
18 there is not substantial evidence to support the City’s conclusion.

19 OSSC requests the Court affirm the City’s decision in *Ordinance*
20 6762 to deny Horton’s MPA because the MPA does not meet the City’s

1 standard for MPA approval that there must be no conflict between the
2 proposal and the City's adopted plans, policies and ordinances.

3 **STATEMENT OF THE CASE**

4 The City may deny the MPA if it finds the MPA is in conflict
5 with the City's adopted plans, policies, and ordinances. OMC
6 18.57.080(D)(3).¹ The City has adopted plans, policies, and ordinances
7 containing standards for bicycle and pedestrian connectivity. See, for e.g.,
8 OMC 18.05.020(A)(2) and (4); EDDS 2.040(B)(3)(e) and 2.040(E)(2);
9 the City's *Minimum Street Design Standards*, Table II; and
10 Comprehensive Plan policies T3.13(a), T3.13(h), T3.20(g) , and T3.20(j).

¹ OMC 1857.080(D)(3) and (4):

3. If the Council finds that the Board's or Examiner's recommendation is in conflict with the City's adopted plans, policies and ordinances; or insufficient evidence was presented as to the impact on surrounding area the Council may:

- a. Deny the MPD application;
- b. Remand the matter back to the Design Review Board or Hearing Examiner for another hearing;
- c. Continue to a future date to allow for additional staff analysis desired by the Council;
- d. Modify the Design Review Board's and Examiner's recommendation based on the applicable criteria and adopt their own findings and conclusions, and deny or approve the Master Plan; or
- e. Schedule its own open-record public hearing.

4. If the Council determines there are no conflicts and sufficient evidence was presented as to the impact on the surrounding area, it shall adopt the Board's and Examiner's recommendation as their own and approve the Master Plan by ordinance. If approved, the Master Plan, or subsequent revision thereto, shall be an amendment to the Official Zoning Map.

1 All of these citations are consistent in their standards, and together
2 require that streets or bicycle and pedestrian connections be provided at
3 intervals of not more than 350 feet throughout the development and at
4 intervals of not more than 350 feet along streets that border the
5 development.

6 OSSC participated in this proceeding in 2006, when public
7 comments were first solicited on the initial version of the Trillium plan.
8 Ex. 1, Attachment CC, 001832-35. OSSC's letter stated the 2006
9 proposed MPA did not meet City requirements for connectivity. A map
10 of the 2006 version of the MPA was attached to the letter to illustrate
11 eight areas where one or more street or bicycle and pedestrian
12 connections were required by the City's requirements. Id. That evidence
13 identifies specific blocks that exceeded 350 feet without either a street or
14 a bicycle and pedestrian connection, but did not calculate the exact
15 number of connections required to satisfy the standard.

16 In 2008, OSSC commented to the City's Design Review Board
17 (DRB) that the proposal to be presented to the DRB did not meet City
18 standards for bicycle and pedestrian connections. Ex. 1, Attachment CC,
19 001744 – 47. The map with 28 marked locations was a representation of
20 the total number of connections required to meet the 350-foot standard;
21 some of the required connections, but by no means all, were included in

1 that 2008 version of the MPA.

2 In June 2010, when the Examiner held the required hearing on
3 this matter, the president of OSSC, Karen Messmer, testified on bicycle
4 and pedestrian issues. As part of her testimony, she provided a plan of the
5 proposed MPA that showed 28 locations where the MPA would have to
6 have street or bicycle and pedestrian connections added to meet City
7 standards for connectivity. Exhibit 702, p. 231. Messmer's testimony was
8 that only 12 of 28 required connections were included; 16 were missing.
9 Id.

10 Subsequent to the Examiner's *October 2010 Recommendation*
11 that resulted from the June 2010 public hearing, Horton and the
12 Community Planning and Development Department (CP&D) filed for
13 reconsideration. Both motions for reconsideration included new
14 testimony. Ex. 150 and 151. OSSC responded to the motions for
15 reconsideration within the five days permitted for filing a response,
16 objected to the inclusion of new testimony on reconsideration, and
17 included new testimony of its own. Ex. 157 and 158.

18 Horton's new evidence submitted with its motion for
19 reconsideration identified eight areas where OSSC had asserted the 350-
20 foot standard required more connections than Horton had included, but
21 Horton argued that for various reasons that those eight areas were

1 locations in which connections were not required. In response to Horton's
2 argument, OSSC's testimony on reconsideration contains detailed
3 analysis of those eight areas with missing connections to demonstrate that
4 16 connections in those eight areas were appropriate and necessary to
5 meet the 350-foot standard and serve the City's connectivity policy. Ex.
6 158, AR 003992 – 4000. OSSC also provided a detailed rebuttal of
7 CP&D's new testimony on reconsideration concerning connectivity. Ex.
8 158, 004000 - 4002.

9 As a result of decisions made by the City Council, the Examiner
10 held a hearing on the motions for reconsideration in March 2011. Once
11 again, OSSC participated. Ex. 190, AR 004438-59; Ex. 708, VT pp. 56 –
12 75.

13 In its written testimony for the March 2011 hearing, OSSC
14 provided detailed evidence on the lack of connectivity, including a
15 detailed table focused on the eight areas identified by Horton in its
16 testimony on reconsideration. OSSC's table describes 16 connections
17 required to meet the 350-foot standard that were missing in the eight
18 areas where Horton had proposed only six connections. Ex. 190, AR
19 004468. A reproduction of the table from Ex. 190, AR 004468, follows
20 on the next page:

21 **Table 1: Lot Narrowing Needed to Provide Required Connections**

Location	Approximate Length (Feet)	Number of Connections Required by EDDS	Number of Lots Shown On Application	Feet Per Lot Needed to Provide Required Connections
Morse Merryman / Road H between Scotch Meadow and Sugarloaf	450	1	10	1.0
Morse Merryman between Sugar Loaf and Hoffman	450	1	11	0.9
Hoffman Road between Morse-Merryman and Log Cabin	1200	3	16	1.8
Road I between Road A and Log Cabin Road	1000	2	26	0.7
Road A between So. Site boundary and Highline Drive	800	2	14	1.4
Road B between Sugarloaf and W. site boundary	700	1	16	0.6
Sugar Loaf between Road B and Log Cabin (space available without affecting lots)	1000	2	8	None: See Discussion
Scotch Meadow between Log Cabin and Morse-Merryman (space available without affecting lots)	1300	4	10	None: See Discussion

1
2 Note: in above calculations, a lot with long axis parallel to the road is counted as two
3 lots.

4
5 The March 2011 hearing at which the above table and related
6 evidence were presented also was the first opportunity OSSC had to
7 comment on Horton's addition to the MPA of seven "soft paths"
8 proposed the week before the hearing. OSSC witnesses Messmer and
9 Lazar testified to the City's requirement that bicycle and pedestrian

1 connections (paths) have a hard surface that may be either pervious or
2 impervious (such as pervious concrete). Ex. 708, VT pp. 57, 61-66, 74-
3 75; Comprehensive Plan policy T3.20(j).

4 Finally, OSSC provided briefing and argument before the City
5 Council. Ex. 502, AR 005792-005817; Ex. 711, VT pp. 72-86. Twelve
6 pages of the brief focused on the evidence in the record that demonstrated
7 the failure of Horton to meet connectivity requirements and also
8 demonstrated Horton could provide required bicycle and pedestrian
9 connections and meet the housing density and other design requirements
10 for an MPA. Ex. 502, AR 005795-005807.

11 The evidence provided by OSSC from 2006 to 2011 was not lay
12 evidence. The credentials of Ms. Messmer and Mr. Lazar are in the
13 record and known to the Olympia City Council. At different stages, their
14 qualifications were provided; the most complete description appears in
15 OSSC's filing on the motions for reconsideration:

16 Lazar...is an officer of OSSC (a party of record), a
17 Washington non-profit corporation. Mr. Lazar has over 35
18 years of experience in transportation system analysis. He
19 was employed by the Senate Transportation Committee of
20 the Washington State Legislature as a specialist in
21 alternative transportation. He is a founding member of the
22 Association of Pedestrian and Bicycle Professionals, the
23 national association of specialists in this field
24 (www.apbp.org). He is a past Chairman of the City of
25 Olympia's Bicycle and Pedestrian Advisory Committee. He
26 is a board member of the Walkable and Livable

1 Communities Institute (WALC, www.walklive.org). The
2 WALC principals and associates, including Dan Burden,
3 our Executive Director, have provided training and
4 technical assistance in transportation and place making to
5 more than 1,000 communities across the United States,
6 including consultancy to the City of Olympia on the design
7 of the 4th / 5th Avenue Bridge corridor.
8

9 Mr. Lazar resides in the immediate vicinity of the proposed
10 Trillium development, and walks and bicycles throughout
11 the area where the proposed development is located. He has
12 experienced development that did provide adequate
13 neighborhood connections, and also those where adequate
14 connections were not provided.
15

16 Karen Messmer...is the Chairperson of OSSC, and is a
17 principal architect and author of the City's goals, policies,
18 codes and standards. She served 11 years on the
19 Olympia Planning Commission including four terms as
20 Chairman, and 4 years on the Olympia City Council.
21 During her tenure, the Development Code and EDDS were
22 both revised with her involvement to incorporate
23 connectivity and walkability. She has also served on the
24 city's Design Review Board, Urban Forestry Board, Parks
25 and Recreation Advisory Committee, and the Bicycle
26 Advisory Committee (predecessor to the Bicycle and
27 Pedestrian Advisory Committee, created in 1993). She
28 served as chairman of the committee that developed the
29 City's Mobility Strategy, adopted by the Council in 2009.
30 She has also served as a member of the Intercity Transit
31 Board of Directors.
32

33 Messmer had a professional career as an urban planner
34 prior to moving to Olympia in 1986. She was a founding
35 member (1996) of the Association of Pedestrian and
36 Bicycle Professionals.
37

38 Ms. Messmer resides in the immediate vicinity of the
39 proposed Trillium development, and walks and bicycles
40 throughout the area where the proposed development is
41 located. She has experienced development that did provide

1 adequate neighborhood connections, and also those where
2 adequate connections were not provided.

3
4 Ex. 158, AR 003391-92. In comparison, none of Horton's or CP&D's
5 witnesses claimed any expertise with respect to bicycle and pedestrian
6 connectivity.

7 The City Council held its hearing on Horton's MPA on June 21,
8 2011. Ex. 503, AR 005966-68. At a subsequent meeting, the City Council
9 adopted *Ordinance 6762* to memorialize its decision. Ex. 505, AR
10 005978. *Ordinance 6762* contains findings, but it also incorporates most,
11 but not all, of the Examiner's three recommendations (the original
12 recommendation and two recommendations made after reconsideration)
13 to serve as the City's conclusions. Notably, the City excluded from
14 incorporation two paragraphs on the topic of bicycle and pedestrian
15 connectivity from the Examiner's final recommendation. Ex. 506, AR
16 005984, *Ordinance 6762*, p. 4, Conclusion of Law ¶ 4.

17 The one finding in *Ordinance 6762* related to bicycle and
18 pedestrian connectivity is Finding 22:

19 The present record is inadequate to make a determination that the
20 Trillium MPA meets the requirements for bicycle and pedestrian
21 connections set forth in the City Code, including the Engineering
22 Design and Development Standards and the Comprehensive Plan.
23 However, in light of the council's decision, a remand is
24 unnecessary. However, in light of the council's decision, a
25 remand is unnecessary.
26

1 Ex. 506, AR 005983, *Ordinance 6762*.

2 The conclusion that relates to bicycle and pedestrian connectivity
3 can only be understood by an explanation of the City's incorporation and
4 exclusion of portions of the Examiner's three recommendations. That
5 explanation follows.

6 The City created additional findings of fact, and adopted
7 conclusions of law by culling the Examiner's three recommendations.
8 The City adopted the findings and conclusions of the October 28, 2010
9 Recommendation (hereafter *October 2010 Recommendation*) that were
10 not rescinded by the April 26, 2011 Recommendation. Ex. 506,
11 *Ordinance 6762*, Finding 19, Conclusion 2. Similarly, the City adopted
12 the findings and conclusions of the December 6, 2010 Recommendation
13 (hereafter *December 2010 Recommendation*) that were not rescinded by
14 the April 26, 2011 Recommendation (hereafter *April 2011*
15 *Recommendation*). Id., Finding 20, Conclusion 3.

16 However, the result of that culling of the October 2010 and
17 December 2010 recommendations was altered by the exclusion of four
18 recommendations from the *April 2011 Recommendation*, in particular
19 exclusion of Conclusion 88 concerning bicycle and pedestrian
20 connectivity and exclusion of Paragraph F in the section the Examiner
21 labeled "Decision." The effect of exclusions from the *April 2011*

1 *Recommendation* is described in the paragraphs that follow.

2 The *October 2010 Recommendation* lists 8 instances where a
3 street or bicycle and pedestrian connections are missing:

4 34. Rough scaling of the Preliminary Site Plan at Ex. 1,
5 Att. E shows the following street lengths without
6 intersecting streets or bicycle or pedestrian paths:

7
8 Morse-Merryman Road and Road H between
9 Scotch Meadow and Sugar Loaf: approximately
10 450 feet;

11
12 Morse-Merryman Road between Sugar Loaf and
13 requested Hoffman Road dedication:
14 approximately 450 feet;

15
16 Hoffman Road dedication between Morse-
17 Merryman and Log Cabin Roads: approximately
18 1200 feet;

19
20 Road I between Road A and Log Cabin Road:
21 approximately 1000 feet;

22
23 Road A between its confluence with southern site
24 boundary and Highline Drive: approximately 800
25 feet;

26
27 Road B between Sugar Loaf and west site
28 boundary: approximately 700 feet;

29
30 Sugar Loaf Street between Road B and Log Cabin
31 Road: approximately 1000 feet; and

32
33 Scotch Meadow Court between Log Cabin and
34 Morse-Merryman Roads: approximately 1300 feet.

35
36 EX. 502, AR 005956-57, *October 2010 Recommendation*, pp. 36-37, ¶

37 49.

1 The *October 2010 Recommendation* acknowledged Horton had
2 included in the MPA at least two bicycle-pedestrian connections, but
3 stated this was insufficient to meet the code and Comprehensive Plan
4 requirements.

5 The pedestrian corridors, Tracts Q through X, help
6 serve this policy. However, they, together with the
7 sidewalks, do little to provide pedestrian and bicycle paths
8 to the boundaries of this development or to provide bicycle
9 shortcuts between roads. Similarly, they do little to supply
10 alternatives to roadway connections between existing local
11 access streets and new streets. For these reasons, the
12 proposal is not consistent with either Comprehensive Plan
13 Policies T3.13 h or T13.20 j. Nor does this dearth of
14 pedestrian and bicycle connections serve the purposes of
15 the NV zone of reducing dependence on auto use, ensuring
16 the safe and efficient movement of goods and people, or
17 facilitating pedestrian access. OMC 18.05.020 (2), (3) and
18 (8).

19
20 EX. 502, AR 005959, *October 2010 Recommendation*, pp. 39-40, ¶
21 62.

22 The *October 2010 Recommendation* then went on to
23 conclude based on the evidence cited immediately above that, “As
24 discussed in Conclusions 60 through 65, the master plan is
25 deficient in the provision of pedestrian/bicycle connections,
26 including those to the perimeter of the project site.” Ex. 502, AR
27 005962-63, *October 2010 Recommendation*, pp. 42-43, ¶ 75.

1 The *December 2010 Recommendation* was made on
2 reconsideration. As a result, it consists primarily of a review of the
3 *October 2010 Recommendation*. On the topic of bicycle and pedestrian
4 connections, the *December 2010 Recommendation* stated:

5 By their terms, the connectivity policies and
6 purposes relied on by the October 28 decision serve
7 different purposes than the requirement that large internal
8 blocks have paths through their middle. Thus, the cross-
9 block paths required by the EDDS may help meet the
10 connectivity policies of the Comprehensive Plan, but
11 compliance with the EDDS requirements does not
12 necessarily mean the Plan policies are met. Here, even
13 with the additional cross-block connections required above,
14 the small amount of pedestrian and bicycle connections,
15 especially to site perimeters, is not consistent with
16 Comprehensive Plan Policies T3.13 h or T13.20 j and does
17 not serve the purposes of the NV zone of reducing
18 dependence on auto use, ensuring the safe and efficient
19 movement of goods and people, or facilitating pedestrian
20 access. OMC 18.05.020 (2), (3) and (8). These
21 inconsistencies preclude approval of the master plan.

22
23 Ex. 502, AR 005915-16, *December 2010 Recommendation*, p. 23,
24 ¶ 69.

25 The *December 2010 Recommendation* confirmed the October
26 2010 Recommendation with respect to bicycle and pedestrian
27 connections:

28 The determination in the October 28, 2010 decision that the
29 proposal is not consistent with the policies of the
30 Comprehensive Plan or the purposes of the NV zone
31 relating to bicycle and pedestrian connectivity remains in
32 effect. The recommendation in that decision that this lack

1 of compliance should compel denial of the proposed master
2 plan if not removed remains in effect. The
3 recommendation to give the Applicant the option of adding
4 bicycle and pedestrian connections to cure the lack of
5 compliance remains in effect.

6
7 Ex. 502, AR 005919-20, *December 2010 Recommendation*, pp. 27-

8 28, ¶ I.

9 The *April 2011 Recommendation* reviews the findings in the
10 October and the December recommendations. Ex. 502, AR 005864-66,
11 *April 2011 Recommendation*, pp. 17-19, ¶¶ 53-64. In Conclusions of
12 Law, paragraph 88, the April 2011 Recommendation states:

13 The prior proposals did not comply with those plans and
14 standards governing pedestrian and bicycle connectivity on
15 the site. The revised proposal, with all the connections
16 described in Part E. 3 of the Findings, together with the
17 cross-block connections discussed above, does.

18
19 Ex. 502, AR 005883, *April 2011 Recommendation*, p. 36, ¶ 88.

20 In the part of the *April 2011 Recommendation* labeled “Decision,” is the
21 recommendation that states:

22 The October 28 and December 6, 2010 decisions
23 concluded that the proposal was not consistent with various
24 Comprehensive Plan policies encouraging
25 pedestrian/bicycle connections. The Applicant responded
26 on remand by proposing the numerous new "soft path"
27 connections described in Part E. 3 of the Findings, above,
28 as well the new and required cross-block connections.
29 With all of the connections described in Part E. 3 of the
30 Findings, whether "soft path" or cross-block paths meeting
31 EDDS specifications, the master plan is consistent with

1 Comprehensive Plan policies and ordinance purpose
2 statements encouraging pedestrian/bicycle connections.

3
4 Ex. 502, AR 005886, *April 2011 Recommendation*, p. 39, ¶ F.

5 However, *Ordinance 6762* states the “Council adopts all
6 Conclusions of the Hearing Examiner’s Decision [sic]² dated April 26,
7 2011, except Conclusions 40, 61, 88, and 90 and except paragraph F on
8 page 39 of the Hearing Examiner’s Decision.” Ex. 506, AR 005984,
9 *Ordinance 6762*, p. 4, Conclusion of Law ¶ 4. That is, the City did not
10 accept the *April 2011 Recommendation* conclusions that Horton’s MPA
11 meets bicycle and pedestrian connectivity standards. The net effect of not
12 accepting Conclusion 88 and paragraph F from the *April 2011*
13 *Recommendation* is that the City’s ultimate conclusion is the conclusion
14 expressed in the *December 2010 Recommendation*:

15 The determination in the October 28, 2010 decision that the
16 proposal is not consistent with the policies of the
17 Comprehensive Plan or the purposes of the NV zone
18 relating to bicycle and pedestrian connectivity remains in
19 effect. The recommendation in that decision that this lack
20 of compliance should compel denial of the proposed master
21 plan if not removed remains in effect.

22
23 Ex. 502, AR 005919-20, *December 2010 Recommendation*, pp. 27-
24 28, ¶ I.

² In Olympia, when a land use proceeding concerns an application for a Master Planned Development, the City Council makes the decisions while the Hearing Examiner is limited to making recommendations. OMC 18.57.040(C); OMC 18.82.160(A). This distinction between who makes a recommendation and who makes a decision is important when determining the standard of review, as explained below.

1 Simply stated, the City Council adopted two explicit and detailed
2 sets of findings that the proposed MPA is deficient in the number of
3 bicycle and pedestrian connections required to meet the 350-foot
4 standard. See Ex. 502, *October 2010 Recommendation*, Findings 49-55,
5 and Ex. 502, *December 2010 Recommendation*, Findings 58-70. The only
6 finding anywhere in the record that differed from those findings was in
7 the *April 2011 Recommendation*, and that finding was not adopted by the
8 City Council and is excluded by *Ordinance 6762*.

9 The result of *Ordinance 6762* on the topic of bicycle and
10 pedestrian connectivity, then, is a finding that the record “is inadequate to
11 make a determination that the Trillium MPA meets the requirements for
12 bicycle and pedestrian connections,” which supports the conclusion “that
13 the proposal is not consistent with the policies of the Comprehensive Plan
14 or the purposes of the NV zone relating to bicycle and pedestrian
15 connectivity.” That conclusion of inconsistency is in the findings from
16 the October 2010 and December 2010 recommendations the City Council
17 adopted.

18 **STANDARD OF REVIEW**

19 Horton has provided an analysis of the standard of review that is
20 essentially correct, with two omissions.

1 Horton omits the relevant case law related to the weight to be
2 given the decision of the City Council versus the weight to be given to
3 the recommendations of the Examiner. Horton also omits the relevant
4 case law related to the requirement that a reviewing court must view facts
5 and inferences in a light most favorable to the party that prevailed in the
6 highest forum exercising fact-finding authority.

7 **A. A City Council’s Final Decision Controls Appellate Review**

8 The City Council held a closed-record hearing on Horton’s
9 proposed MPA including the topic, *inter alia*, of bicycle and pedestrian
10 connectivity. One result of that closed-record hearing is the City Council
11 did not accept the recommendations of the Examiner that issues related to
12 bicycle and pedestrian connectivity not form the basis for denial of the
13 MPA.³ Ex. 506, *Ordinance 6762*. When a city council has non-appellate
14 decision-making authority, it is the city council’s decision that controls
15 review. *Phoenix Dev., Inc. v. City Of Woodinville*, 171 Wn.2d 820, 837-
16 38 (2011) (“Although the City staff concluded the proposals complied
17 with the comprehensive plan, it is the City’s final decision that controls
18 our review.” Footnote omitted.). City code is consistent with the
19 conclusion of *Phoenix*; the code states, “If any of the permits or approvals

³ While CP&D had recommended to the Examiner that the MPA not be denied based on connectivity, CP&D made no recommendation at the City Council’s closed-record hearing. Ex. 151, AR 003939; Ex. 711, VT 14-17.

1 require or include a rezone or Master Planned Development, then the
2 decision of the Hearing Examiner as to all such permits or approvals shall
3 constitute a recommendation to the City Council[.]” OMC 18.82.160(A).⁴

4 Horton’s effort to bolster its case by stating “[t]he Examiner
5 concluded that the Master Plan provided sufficient connectivity” must be
6 ignored. Op. Br. at 49. If it is not ignored, then the Court will elevate the
7 portion of the *recommendation* of the Examiner explicitly not adopted
8 above the *decision* of the City Council, a result contrary to *Phoenix*.

9 **B. The Court Must View The Facts And Inferences In A Light**
10 **Most Favorable To OSSC Because OSSC Was The Only Prevailing**
11 **Party Before The Highest Forum Exercising Fact-Finding Authority.**

12 When reviewing a challenge to the sufficiency of the evidence, a
13 reviewing court views facts and inferences in a light most favorable to the
14 party that prevailed in the highest forum exercising fact-finding authority.
15 *Woods v. Kittitas County*, 162 Wn.2d 597, 617 (2007). When the City
16 Council considers a Master Plan Application, it enters findings of fact
17 and conclusions of law, and it therefore is the “highest forum exercising
18 fact-finding authority” in this proceeding because the Hearing Examiner

⁴ “If any of the permits or approvals require or include a rezone or Master Planned Development, then the decision of the Hearing Examiner as to all such permits or approvals shall constitute a recommendation to the City Council; otherwise, the decision of the Hearing Examiner shall be final subject to appeal to the Council pursuant to Sections 18.75.080 and 18.75.100.”

1 makes only recommendations to the City Council. OMC
2 18.57.080(D)(3)(d); OMC 18.82.160(A); *See also* Ex. 506 (“AN
3 ORDINANCE of the City Council of the City of Olympia, Washington
4 adopting Council Findings of Fact, Conclusions of Law,...”).

5 The parties that appeared before the City Council were Horton,
6 CP&D, OSSC, and nine residents of the area near the proposed MPA. Ex.
7 506, *Ordinance 6762*, ¶ 18.⁵ OSSC and the nine residents were the only
8 parties before the City Council that advocated denial of the MPA; the
9 nine residents of the area are not parties to this LUPA proceeding.

10 The City denied Horton’s MPA based on lack of transit service
11 and based on the conflict with the City’s adopted plans, policies and
12 ordinances related to bicycle and pedestrian connectivity.⁶ Ex. 506,
13 *Ordinance 6762*. OSSC is the only party to this LUPA proceeding that
14 prevailed in the highest forum exercising fact-finding authority. OSSC
15 advocated for denial based on the conflict with the City’s adopted plans,
16 policies and ordinances related to bicycle and pedestrian connectivity and

⁵ Olympia defines a “Party of Record” as “the applicant and any person who prior to a decision has requested notice of the decision or submitted substantive comments on an application.” OMC 18.02.180. OSSC submitted substantive comments throughout the administrative proceeding and also submitted substantive comments in the form of argument to the City Council prior to its June 21, 2011 hearing. Ex. 502, AR 005792-005817.

⁶ The City also addressed compliance with City Comprehensive Plan PF 33.5 concerning school capacity, but it is not clear that the City denied approval based on issues related to school capacity.

1 obtained the denial it sought from the City. Consistent with *Woods*,
2 OSSC is entitled to have the Court view the facts and inferences in a light
3 most favorable to OSSC. The alternative, to view the facts and inferences
4 in a light most favorable to Horton, would be wholly inconsistent with
5 *Woods*.

6 **ARGUMENT**

7 Horton's Opening Brief focuses only on the sufficiency of the
8 evidence to support the City's decision as expressed by Ordinance 6762.
9 Op. Br., pp. 47-50; Assignment of Error 2, Op. Br., p. 1.⁷ Horton's
10 burden on appeal, then, is to convince the Court there is not substantial
11 evidence to support the City's decision. *Wenatchee Sportsmen Ass'n v.*
12 *Chelan County*, 141 Wn.2d 169, 176 (2000).

13 To prevail in this appeal, Horton must demonstrate the City's
14 decision with respect to bicycle and pedestrian connectivity is not

⁷ Horton's Assignment of Error 7 contends the City erred in not adopting Examiner conclusions 88 and paragraph F from the *April 2011 Recommendation*, but Horton's brief never addresses directly or indirectly the City's decision not to adopt conclusion 88 and paragraph F. Assignment of Error 7 and Examiner conclusions 88 and paragraph F are not mentioned in the three pages Horton devotes to bicycle and pedestrian connectivity. Op. Br., pp. 47-50. There is no explanation by Horton of the nature of the claimed error and no citations to case law to support a conclusion that when a City Council is acting in a non-appellate role it may not reject portions of an Examiner's recommendation. Accordingly, there is nothing associated with Assignment of Error 7 to which OSSC can respond in this brief. OSSC's position is Horton provided no argument to support Assignment of Error 7, the assignment is waived, and Horton is foreclosed from addressing the assignment in its reply brief. "A party that offers no argument in its opening brief on a claimed assignment of error waives the assignment." *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809 (1992).

1 supported by a sufficient quantity of evidence to persuade a fair-minded
2 person of the truth or correctness of the order. *City Of Arlington v. Cent.*
3 *Washington Growth Mgmt. Hearings Bd.*, 164 Wn.2d 768, 780 (2008).
4 The existence of contrary evidence plays no role in a determination
5 whether there is a sufficient quantum of evidence in the record to
6 persuade a reasonable person that the declared premise is true. *Phoenix*,
7 171 Wn.2d at 832 (“Although there is also evidence in the record to
8 support Phoenix’s claim that there is a ‘need’ to rezone the properties, the
9 court’s role is not to determine whether evidence may support one
10 decision over another. The standard of review here is to determine
11 whether there is a sufficient quantum of evidence in the record to
12 persuade a reasonable person that rezoning is not needed at this time.”).
13 The existence of contrary evidence plays no role because when a
14 reviewing court considers a challenge based on the substantial evidence
15 standard it does not weigh the evidence or substitute its judgment.
16 *Phoenix*, 171 Wn.2d at 832.

17 **A. The Record Contains Extensive Testimony That Demonstrates**
18 **Horton Did Not Meet The City’s Adopted Plans, Policies, And**
19 **Ordinances Concerning Bicycle And Pedestrian Connectivity.**

20 **1. The City has meaningful and measurable standards**
21 **concerning bicycle and pedestrian connectivity.**

1 Horton claims the City “has no meaningful, measurable standards
2 governing connectivity.” Op. Br., p. 49. If Horton’s claim is correct, then
3 no amount of evidence, however convincing to a fair-minded person, can
4 serve as the basis for the City’s decision. Unfortunately for Horton, not
5 only does the City have adopted plans, policies, and ordinances
6 controlling bicycle and pedestrian connectivity, the standards are
7 meaningful and measurable, and are also clear and unambiguous. OSSC
8 placed the standards in the record. See, for e.g., Ex. 502, AR 005792-
9 005817; Ex. 711, VT pp. 72-86.

10 City code for Urban Village and Neighborhood Village MPDs
11 requires “direct, convenient pedestrian, bicycle, and vehicular access
12 between residences in the development and the village center, in order to
13 facilitate pedestrian and bicycle travel and reduce the number and length
14 of automobile trips.” OMC 18.05.020(A)(4). That requirement exists
15 “[t]o enable a land use pattern which will reduce dependence on auto use,
16 especially drive-alone vehicle use during morning and evening commute
17 hours.” OMC 18.05.020(A)(2).

18 The 2004 EDDS transportation standards for local access streets
19 require a street connection every 250-350 feet creating block lengths of
20 250-350 feet, or, where a street connection is not possible every 250 to
21 350 feet, there must be a bicycle-pedestrian connection at the 250 to 350

1 foot block spacing criteria of the EDDS.⁸ Ex. 162, 004085 (*Minimum*
2 *Street Design Standards*, Table II) (the Table is attached as Appendix A).

3 The EDDS also contemplate circumstances when it may not be
4 possible to have a *street* connection every 250 to 350 feet. “Where larger
5 blocks are necessary due to topography, existing development, or other
6 constraints, intervening public cross-block pedestrian, bicycle, and
7 emergency access *will be provided*.” Ex. 198, 005160-61 (EDDS
8 2.040(B)(3)(e) (italics added in this brief)).

9 The Comprehensive Plan transportation policy section also
10 contains bicycle-pedestrian standards:

11 T3.13(a). Create as many connections as possible
12 throughout the network using the street network spacing
13 criteria. (See Table VI-7 [sic]⁹.)
14

15 T3.13(h). Limit driveway access... and design in as many
16 pedestrian/bike connections as possible.
17

18 T3.20(g). Require that blocks be small enough (e.g., 250
19 to 350 feet) to create easy travel options for motorized and
20 non-motorized travel. [NOTE: *Standard blocks in older*
21 *residential areas in Olympia that are 250 to 350 feet long*
22 *are considered walkable*. [sic]] [The NOTE appears in the
23 original.]
24

25 ...
26 T3.20(j). Provide a network of paved pedestrian and
27 bicycle paths separated, where possible, from motor
vehicle travel lanes, to and through existing and future

⁸ OMC 12.02.020 incorporates the EDDS into the municipal code.

⁹ There does not appear to be a Table VI-7 in the City’s Comprehensive Plan, but there is a Table VI-1 that repeats the street network spacing found in the City’s EDDS *Minimum Street Design Standards*, Table II.

1 neighborhoods, shopping areas, parks, collector roads, and
2 schools. These paths should provide shortcuts between
3 roads, rather than paralleling them. These shortcut paths
4 may appropriately serve as an alternative to roadway
5 connections between existing local access streets and new
6 streets, depending on the objectives to be furthered by a
7 particular connection. They would be in addition to the
8 sidewalks needed along the roads themselves. This
9 network would provide for local movement, unlike the
10 regionally-oriented Urban Trails system.

11
12 Comprehensive Plan, *Chapter 6 (Transportation)*, Policies T3.13
13 and T3.20 (underline added).

14 **a. City staff testified that the City has bicycle and**
15 **pedestrian connectivity standards.**

16 Horton and OSSC are not alone in having an opinion on
17 the presence or absence of City standards for bicycle and
18 pedestrian connectivity. Before the Examiner, City staff testified
19 to the City's policy and OSSC highlighted this testimony before
20 the City Council:

21 The City's transportation engineer, Mr. Dave Smith,
22 addressed the transportation connection requirement during
23 examination by the City Manager's attorney, Mr. Nienaber.
24 Mr. Nienaber asked Mr. Smith:

25
26 ...there was an issue, or a suggestion that there
27 should be additional bike/ped connections
28 placed every 300 feet....is there anything you'd
29 like to say with regard to that recommendation
30 from the public?

31
32 Transportation engineer Smith responded:

1
2 That is our standard. Where you cannot create
3 street connections, and you end up with larger
4 block sizes and can't meet the street spacing
5 requirements, our standards do require that a
6 bicycle-pedestrian connection be made.
7

8 February 2011 Record, p. 468 (quotations are from June,
9 2010 hearing).
10

11 Ex. 502, AR 005802 (footnote omitted).

12 **b. The City's Comprehensive Plan has meaningful**
13 **and measurable standards that must be followed, and the**
14 **Comprehensive Plan also contains policies that must be**
15 **followed because they do not conflict with development**
16 **regulations.**

17 In addition to claiming the City has no standards in its code or
18 EDDS, Horton also claims the City's Comprehensive Plan cannot be used
19 as a source of requirements or standards. Op. Br., p. 22 ("All Master Plan
20 requirements are contained in City Code; there is no City Code
21 requirement that the Master Plan also be analyzed for consistency with
22 the City's Comprehensive Plan."). That position ignores completely
23 RCW 36.70B.030(1), which declares comprehensive plans "serve as the
24 foundation for project review;" and also ignores completely OMC
25 18.02.040 and 18.02.100, which require consistency and conformity with

1 the City's Comprehensive Plan.¹⁰

2 The requirement in City code for consistency and conformity with
3 the City's Comprehensive Plan cannot be read out of the code. A similar
4 code section was reviewed in *Lakeside Indus. v. Thurston County* and the
5 court enforced Thurston County's code that stated land use decisions
6 must comply with "all...plans." *Lakeside Indus. v. Thurston County*, 119
7 Wn. App. 886, 895 (2004) ("But where the zoning code itself expressly
8 requires a site plan to comply with a comprehensive plan, the proposed
9 use must satisfy both the zoning code and the comprehensive plan."
10 Citing *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 43 (1994)).

11 As set forth above, it is apparent the Comprehensive Plan has
12 policies for bicycle and pedestrian connectivity that are consistent with
13 the specific requirements of the City's EDDS. For example with respect
14 to local access connections, EDDS 2.040(B)(3)(e) and the *Minimum*

¹⁰ "Fundamental land use planning choices made in adopted comprehensive plans and development regulations shall serve as the foundation for project review." RCW 36.70B.030(1); "It is the purpose of this Development Code to promote the health, safety and general welfare by guiding the development of the city consistent with the comprehensive plan which is, in part, carried out by the provisions of this title." OMC 18.02.040; "This Development Code is a principal tool for implementing the goals and policies of the Olympia Comprehensive Plan, pursuant to the mandated provisions of the Growth Management Act of 1990, RCW 58.17, Subdivision Act, State Environmental Policy Act, and other applicable State and local requirements. All development within the city incorporated boundary - and the urban growth area shall be consistent with Olympia's Comprehensive Plan." OMC 18.02.100; and "No land shall be subdivided or developed for any purpose which is not in conformance with the Comprehensive Plan, any zoning ordinance or other applicable provisions of the Olympia Municipal Code." OMC 18.02.100.

1 *Street Design Standards*, Table II, require a street or a bicycle and
2 pedestrian path every 250-350 feet (every block).¹¹ Comprehensive Plan
3 policy T3.13(a) requires that developers “[c]reate as many connections as
4 possible throughout the network using the street network spacing
5 criteria.” The policy to “create as many connections as possible” relies on
6 the street network spacing criteria of EDDS 2.040(B)(3)(e) and the
7 *Minimum Street Design Standards*, Table II. Because the policy can be
8 read together with the EDDS without creating a conflict, the
9 Comprehensive Plan policy must be fulfilled. *Lakeside Indus.*, 119 Wn.
10 App. at 895 and 905; Cf. *Citizens of Mount Vernon v. City of Mount*
11 *Vernon*, 133 Wn.2d 861 (1997) (Elevating development regulations
12 above comprehensive plan policies only when there is a clear
13 contradiction between the development regulations and the
14 comprehensive plan policies.)

15 Horton’s claim that the City’s Comprehensive Plan cannot be
16 used as a source of requirements or standards is incorrect. The opposite is
17 correct; the City’s code requires the City to rely on its Comprehensive
18 Plan policies to evaluate whether Horton’s MPA is consistent with the

¹¹ For a street longer than 500 feet, if a bicycle and pedestrian path is placed to intersect the street at 250-350 feet, then there must be an intersecting street placed at or before 500 feet. That is, for local access streets, there must be at least one street intersection for every 500 feet.

1 City's adopted codes, plans, and policies.

2 **2. The record contains evidence that is substantial in**
3 **detail, substantial in thoroughness, and substantial in volume.**

4 All of the adopted plans, policies, and ordinances cited above
5 appear in the litany of evidence provided by OSSC to demonstrate that
6 Horton's several versions of its proposed MPA were in conflict with the
7 City's adopted plans, policies, and ordinances for bicycle and pedestrian
8 connectivity. Even Horton states that OSSC "provided extensive
9 testimony and comment related to...connectivity (pedestrian and
10 bicycle)." Op. Br., p. 47.

11 In 2006, OSSC provided evidence that the 2006 proposed MPA
12 did not meet city requirements for connectivity. Ex. 1, Attachment CC,
13 001832-35. The evidence included a map of the 2006 version of the MPA
14 that illustrated eight areas where street or bicycle and pedestrian
15 connections were required by the City's requirements but were not
16 included in the proposal. Id.

17 OSSC provided evidence to the City's Design Review Board that
18 the 2008 version of the proposed MPA did not meet City standards for
19 bicycle and pedestrian connections. Ex. 1, Attachment CC, 001744 – 47.

20 In June 2010, when the Examiner held the required hearing on
21 this matter, OSSC testified concerning the failure of the proposed MPA

1 to meet the City's requirements and standards for bicycle and pedestrian
2 connectivity. Along with testimony, OSSC provided a copy of the plan of
3 the proposed MPA that showed at least 28 locations where the MPA
4 would have to have street or bicycle and pedestrian connections to meet
5 City standards for connectivity and noted that 16 of the 28 required
6 connections were missing. Exhibit 702, p. 231.

7 OSSC provided testimony in response to motions for
8 reconsideration brought by Horton and CP&D. The testimony contains
9 detailed analysis of eight areas identified by Horton where one or more
10 required connections were missing from each of the eight areas. Ex. 158,
11 pp. 2-10; see also the table reproduced on p. 7. OSSC's testimony also
12 contains a detailed rebuttal of CP&D's new testimony concerning
13 connectivity. Ex. 158, pp. 10-12.

14 OSSC also provided evidence at the hearing on reconsideration
15 in March 2011. Ex. 190, AR 004438-59; Ex. 708, VT pp. 56 – 75. In its
16 written testimony for the March 2011 hearing, OSSC provided detailed
17 evidence on the lack of 16 required connections in the eight areas
18 identified in Horton's evidence on reconsideration. Ex. 190, AR 004450;
19 AR 004468. Additionally, the March 2011 hearing was the first
20 opportunity OSSC had to comment on the several "soft paths" proposed
21 by Horton only one week before the hearing. OSSC testified to the City's

1 requirement that bicycle and pedestrian connections (paths) have a hard
2 surface that is either pervious or impervious.¹² Ex. 708, VT pp. 57, 61-66,
3 74-75.

4 Finally, OSSC provided briefing and argument before the City
5 Council that reviewed the evidence and testimony in the record on the
6 topic of bicycle and pedestrian connectivity. Ex. 502, AR 005792-
7 005817; Ex. 711, VT pp. 72-86. Twelve pages of the brief focused on the
8 evidence in the record that demonstrated the failure of Horton to meet
9 connectivity requirements and also demonstrated Horton could provide
10 required connections and meet the housing density and other design
11 requirements for an MPA. Ex. 502, AR 005795-005807.

12 In summary, OSSC's participation at every stage of the
13 administrative process consisted of many pages of detailed evidence
14 along with considerable expert testimony that demonstrates the City has
15 meaningful and measurable requirements and standards for bicycle and
16 pedestrian connectivity that were not met by Horton's proposed MPA.
17 Whether measured by detail and thoroughness, or measured by volume,
18 or both, OSSC presented substantial evidence on which the City could
19 rely to reach its decision. On the record presented then, the Court can find
20 the City's decision with respect to bicycle and pedestrian connectivity is

¹² There is now available both pervious asphalt and concrete.

1 supported by a sufficient quantity of evidence to persuade a fair-minded
2 person of the correctness of the order. *City Of Arlington*, 164 Wn.2d 780.

3 **3. Horton effectively admits its MPA does not meet the**
4 **City’s standards for bicycle and pedestrian connections.**

5 In Horton’s Opening Brief, Horton states it “also voluntarily
6 incorporated many of Olympia Safe Street Campaign’s requested
7 pedestrian and bicycle connections into the master plan design.” Op. Br.,
8 p. 12. While Horton characterizes the seven “soft paths” it offered at the
9 last opportunity in the Examiner process as “requested...connections,” in
10 fact the evidence shows that OSSC advocated only for connections
11 *required* by the City’s adopted plans, policies and ordinances. Horton
12 uses in its brief, as it did in March 2011, the “requested” characterization
13 to avoid acknowledging that for five years Horton’s proposed MPA
14 versions did not meet requirements and standards for street or bicycle and
15 pedestrian connections.

16 Horton also admits in that statement that even after incorporating
17 the seven “soft paths” into the proposed MPA, the MPA does not meet
18 the City’s connectivity standards. Horton stated it incorporated “many” of
19 the connections, but because the connections OSSC demonstrated were
20 missing were all connections required by City standards, one must read
21 Horton’s statement that it added “many” of the required connections to

1 mean that Horton did not incorporate *all* the connections required by the
2 350-foot standard. This is an admission that Horton’s MPA falls short of
3 meeting City standards.

4 Furthermore, the City standard for bicycle and pedestrian
5 connections is that they comply with the Americans with Disability Act
6 (ADA), which includes that they be paved.¹³ On Horton’s revised map,
7 four of the seven proposed “soft paths” are labeled “Narrower soft path
8 not ADA accessible.”¹⁴ Ex. 502, AR 005817. OSSC argued to the City
9 Council that those four “soft paths” would become “muddy trails” and
10 that muddy trails are not consistent with the City’s standard. Ex. 502, AR
11 005807; EDDS 2.040(E)(2).

12 **4. Horton’s contrary evidence.**

13 Horton provided evidence contrary to OSSC’s, but the existence
14 of contrary evidence is not sufficient to overcome the City’s decision.
15 *Phoenix*, 171 Wn.2d at 832. The reason existence of contrary evidence
16 plays no role in a determination whether substantial evidence supports the
17 City’s decision is because when a reviewing court considers a challenge
18 based on the substantial evidence standard it does not weigh the evidence

¹³ Bicycle-pedestrian connections are part of the City’s transportation network and the 2004 EDDS require bicycle-pedestrian connections that are ADA-compliant (at least 10 feet wide, have a hard surface, and be illuminated). 2004 EDDS Section 2.040(E)(2).

¹⁴ It is not clear from Horton’s map or the record if the three paths not labeled “Narrower soft path not ADA accessible” would be built to the City standard.

1 or substitute its judgment. *Id.* Only if the Court were permitted to
2 substitute its judgment for the City’s judgment would the Court need a
3 basis (the contrary evidence) to support its substituted judgment.

4 **5. Horton’s claim “the code leaves the quantity and**
5 **location of pedestrian/bicycle connections to the applicant and City**
6 **planner(s) reviewing the project” is incorrect.**

7 Horton’s claim “the code leaves the quantity and location of
8 pedestrian/bicycle connections to the applicant and City planner(s)
9 reviewing the project” is essentially a claim that the decision to approve
10 or deny an MPA does not belong to the City Council. Op. Br., p. 49. The
11 municipal code is clear the decision rests with the City Council. OMC
12 18.57.080. Contrary to Horton’s assertion, under law, city planner(s) do
13 not make ultimate decisions.

14 **6. Horton’s claim it “included as many pedestrian,**
15 **bicycle connections as possible while balancing all Neighborhood**
16 **Village Master Plan components” is contradicted by evidence in the**
17 **record.**

18 The Examiner’s *October 2010 Recommendation* determined
19 Horton’s MPA does not “comply with street spacing or block size
20 requirements of the EDDS” in addition to finding there was a “dearth of
21 pedestrian and bicycle connections.” Ex 502, AR 005964; AR 005959.

1 As a result, at the March 2011 reconsideration hearing, Horton attempted
2 to convince the Examiner that it could not make changes to the MPA
3 without reducing the number of planned dwellings and as a result reduce
4 housing density below the City's housing density requirement. Ex. 502,
5 AR 005860-61; AR 005878-79. However, Horton limited its assertion
6 related to housing density to the topic of adding more streets; Horton did
7 not advance the housing density argument in relation to bicycle and
8 pedestrian connections. (The Olympia local-access street standard is 25
9 feet wide while a paved bicycle and pedestrian transportation connection
10 is only 10 feet wide.) Because Horton did not make its housing density
11 reduction argument in the context of bicycle and pedestrian connections
12 but only in the context of street requirements, Horton's claim that a
13 balance was struck between bicycle and pedestrian connection
14 requirements and housing density is not supported by the record.

15 In comparison, based on the evidence in the record from the
16 March 2011 hearing, OSSC argued before the City Council that the
17 addition of the required number of bicycle and pedestrian connections
18 need not result in a reduction in density. Ex. 502, AR 005797-005800.
19 OSSC showed how the MPA could be adjusted in small ways to allow for
20 inclusion of the missing connections.

1 Horton’s assertion on the topic of minimum density is just one
2 more example where substantial evidence and argument were presented
3 to the City and the City used that substantial evidence to reach a
4 conclusion that would be convincing to a fair-minded person. And once
5 again, Horton argues that its own evidence is superior, but Horton cannot
6 demonstrate there is not substantial evidence on which the City could
7 have relied to reach its decision.

8 **7. Horton’s claim the City did not “reach a substantive**
9 **decision” is contradicted by *Ordinance 6762*.**

10 At the very end of its Opening Brief, Horton claims the City did
11 not “reach a substantive decision” and claims the City failed to “explain
12 why it found the large volume of evidence in the record ...inadequate.”
13 Op. Br., pp. 49-50. Horton then asserts the “Council’s finding in this
14 respect [bicycle and pedestrian connectivity] cannot possibly have been
15 based on substantial evidence.” Id. Neither the claims nor the final
16 assertion are correct.

17 As explained above extensively, on the topic of bicycle and
18 pedestrian connectivity, through the incorporation provided for in
19 *Ordinance 6762* as well as the exclusion of portions of the *April 2011*
20 *Recommendation*, the City reached the very substantive decision that the

1 proposed MPA does not meet the requirements of City code and is not
2 consistent with the City's Comprehensive Plan:

3 The pedestrian corridors, Tracts Q through X, help
4 serve this policy. However, they, together with the
5 sidewalks, do little to provide pedestrian and bicycle paths
6 to the boundaries of this development or to provide bicycle
7 shortcuts between roads. Similarly, they do little to supply
8 alternatives to roadway connections between existing local
9 access streets and new streets. For these reasons, the
10 proposal is not consistent with either Comprehensive Plan
11 Policies T3.13 h or T13.20 j. Nor does this dearth of
12 pedestrian and bicycle connections serve the purposes of
13 the NV zone of reducing dependence on auto use, ensuring
14 the safe and efficient movement of goods and people, or
15 facilitating pedestrian access. OMC 18.05.020 (2), (3) and
16 (8).

17
18 EX. 502, AR 005959, *October 2010 Recommendation*, pp. 39-40, ¶
19 62.

20 The City then went on to conclude based on the evidence
21 cited immediately above that, "As discussed in Conclusions 60
22 through 65, the master plan is deficient in the provision of
23 pedestrian/bicycle connections, including those to the perimeter of
24 the project site." Ex. 502, AR 005962-63, *October 2010*
25 *Recommendation*, pp. 42-43, ¶ 75.

26 The City also stated, again by incorporation as provided for in
27 *Ordinance 6762*:

28 Here, even with the additional cross-block
29 connections required above, the small amount of pedestrian

1 and bicycle connections, especially to site perimeters, is not
2 consistent with Comprehensive Plan Policies T3.13 h or
3 T13.20 j and does not serve the purposes of the NV zone of
4 reducing dependence on auto use, ensuring the safe and
5 efficient movement of goods and people, or facilitating
6 pedestrian access. OMC 18.05.020 (2), (3) and (8). These
7 inconsistencies preclude approval of the master plan.
8

9 Ex. 502, AR 005915-16, *December 2010 Recommendation*, p. 23,

10 ¶ 69.

11 Contrary to Horton’s claim that there was no substantive
12 conclusion by the City, the above citations demonstrate that
13 *Ordinance 6762* reached a very substantive conclusion on the topic
14 of bicycle and pedestrian connectivity.

15 As to Horton’s claim the City failed to “explain why it found the
16 large volume of evidence in the record ...inadequate,” Horton attempts to
17 claim the City found the volume of evidence in the record inadequate to
18 reach a substantive decision. As just demonstrated, the City did reach a
19 substantive decision based on the extensive record. The City supported
20 that decision by finding that “the present record is inadequate to make a
21 determination that the Trillium MPA meets the requirements for bicycle
22 and pedestrian connections set forth in the City Code, including the
23 Engineering Design and Development Standards (“EDDS”).”¹⁵ Ex. 506,

¹⁵ The second sentence in Finding 22 (“However, in light of the council’s decision, a remand is unnecessary.”) is unrelated to Conclusion of Law ¶ 4 in *Ordinance 6762* that

1 AR 005983, *Ordinance 6762*. That finding is merely an alternative way
2 to state that Horton failed to meet its burden to demonstrate there is no
3 conflict between the proposed MPA and the City's adopted plans,
4 policies and ordinances. OMC 18.57.080(D)(3).¹⁶

5 As to Horton's assertion on the final page of its Opening Brief
6 that the "Council's finding in this respect [bicycle and pedestrian
7 connectivity] cannot possibly have been based on substantial evidence,"
8 the previous thirty pages of this brief contain extensive citations to a very
9 substantial amount of evidence in the record on which the City could
10 have relied, and clearly did rely, to reach its substantive decision that
11 Horton's MPA is in conflict with the City's adopted plans, policies and
12 ordinances.

13 **8. There is no basis on which the Court may approve**
14 **Horton's MPA.**

15 There is, finally, one ultimate result that cannot be denied: the
16 City did not conclude Horton's MPA is consistent with the City's adopted

the MPA is inconsistent with the Comprehensive Plan and OMC 18.05.020 (2), (3) and (8). Ex. 506, AR 005984, *Ordinance 6762*, p. 4, Conclusion of Law ¶ 4. Because the conclusion is substantive and unambiguous, and because the unrelated sentence in the finding concerns process rather than substance, the best reading of *Ordinance 6762* in its entirety is that the ordinance concludes the MPA is not consistent with the City's adopted plans, policies, and ordinances. OMC 18.57.080(D)(3).

¹⁶ A review of the verbatim transcript of the City Council hearing reveals the council deliberated in public and the City Attorney did not review with the council the standard for denial found in 18.57.080(D)(3). It is therefore not surprising the council's ordinance does not use the words of OMC 18.57.080(D)(3).

1 plans, policies and ordinances. Even if the Court concludes, as Horton
2 argues, that the City did not reach any substantive conclusion, that result
3 should still preclude approval of Horton's MPA by the Court.

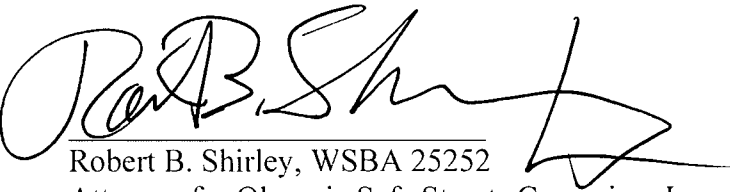
4 If the Court finds the City did not reach a substantive conclusion
5 as Horton asserts, then the best response to such a conclusion would be a
6 remand to the City with direction to the City to make a substantive
7 conclusion.

8 **ATTORNEY'S FEES**

9 OSSC requests reasonable attorney's fees under RCW 4.84.370.
10 OSSC is the only party to this LUPA proceeding that sought denial
11 before the City and before the superior court. *Ordinance 6762* is a
12 decision on the merits in OSSC's favor. The City was affirmed on the
13 merits by the superior court. OSSC qualifies therefore as a prevailing
14 party or substantially prevailing party before the City and in superior
15 court.

16 Dated this 30th day of August, 2012.

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Robert B. Shirley, WSBA 25252
Attorney for Olympia Safe Streets Campaign, Inc.

APPENDIX A

The material on the following page was converted from a .pdf of the City of Olympia's
2004 Engineering Design and Development Standards, Minimum Street design Standards, Table II, p. 4-14

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TABLE II

STREET CHARACTERISTICS	ARTERIAL STREET	MAJOR COLLECTOR	NEIGHBORHOOD COLLECTOR	LOCAL ACCESS STREET
Types of Traffic Served	Regional and City-wide	Sub-regional, feed Arterial traffic	Subarea and local traffic, feed Major Collector traffic	Local traffic, feed Neighborhood/Major Collector, or Arterial Traffic
Traffic Volumes	14,000 - 40,000 Average Daily Traffic	3,000 - 14,000 Average Daily Traffic	500 - 3,000 Average Daily Traffic	0 - 500 Average Daily Traffic
Percent Local Traffic	0 - 15% of origins and destinations are within a one mile radius of the street.	0 - 30% of origins and destinations are within a one mile radius of the street	70% - 100% of origins and destinations are within a one mile radius of the street	80% - 100% of origins and destinations within a one mile radius of the street
Average Travel Length	10 to maximum miles	2 to 15 miles	1 to 2 miles	Minimum to two miles
Street Spacing	1 - 2 miles	2 - 3/4 mile	1000' - 1500'	350' - 500' (2 blocks)
Intersection Spacing (1)	500' - 750' (2-3 blocks)	350' - 500' (2 blocks)	250' - 350' (1 block)	250' - 350' (1 block)
Design Speed	30 -45 miles per hour	25 - 35 miles per hour	25 miles per hour	20 - 25 miles per hour
On-Street Parking	No – except where parking exists and where exempt	No – except where parking exists and where exempt	Yes – with bulb-outs at intersections.	Yes
Drive-Way Access	No	No – except for existing development	Yes	Yes
Bike Lanes (Class II or Class III)	Yes - except Plum, Olympic, or Harrison east of Division	Yes – except Eskridge from Capitol to Henderson	Optional – refer to Comprehensive Plan Bicycle Map 6-2	No
Planting Strips (between sidewalk and curb)	Yes	Yes	Yes	Yes
Sidewalks	Yes	Yes	Yes	Yes
Traffic Calming	No	As needed	Yes - if problem is anticipated or determined through an engineering study	Yes - if problem is anticipated or determined through an engineering study
Transit Shelters	Every 2 mile	Every 2 mile	None	None
Transit Pullouts	Every 2 mile	Every 2 mile	None	None

(1) These intersection spacing requirements will not be used as criteria/justification to close existing streets.

FILED
COURT OF APPEALS
DIVISION II
2012 AUG 31 PM 1:16
STATE OF WASHINGTON
BY
DEPUTY

No. 43300 -1- II

Thurston County Superior Court # 11-2-01733-5
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

SSHI LLC, a Delaware limited liability corporation dba DR Horton

Petitioner/Appellant

vs.

THE CITY OF OLYMPIA,
a Washington municipal corporation

Respondent

OLYMPIA SAFE STREETS CAMPAIGN, INC., a Washington non-profit
corporation

Intervenor

CERTIFICATE OF SERVICE

Atty: Robert B. Shirley, WSBA 25252
1063 Capitol Way S. # 202
Olympia, WA 98501
360-556-7205
robertshirleyattorney@hotmail.com

CERTIFICATE OF SERVICE

I certify that I have served a copy of INTERVENOR'S RESPONSE BRIEF in *SSHI dba DR Horton v. City of Olympia*, Case # 43300-1-II via first class mail to:

City Attorney
City of Olympia
Olympia City Hall
601 4th Ave. E.
Olympia, WA 98501

Peter Eglick
Jane S. Kiker
Egler Kiker Whited PLLC
1000 2nd Ave Ste 3130
Seattle, WA 98104-1046

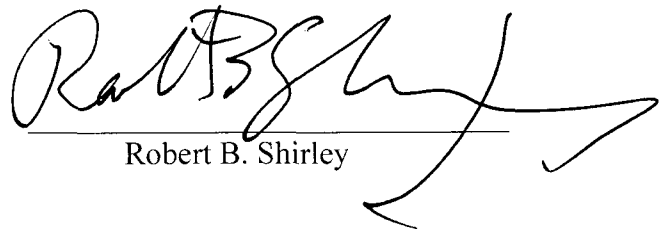
Ms. Duana Kolouskova
Attorney at Law
Johns Monroe Mitsunaga Kolouskova
1601 114th Ave. SE, Suite 110
Bellevue WA 98004

And by electronic mail to:

eglick@ekwlaw.com; kolouskova@jmmlaw.com;
tmorrill@ci.olympia.wa.us; kiker@ekwlaw.com

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 30th day of August, 2012
Olympia, Thurston County


Robert B. Shirley